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No. _____

In The

Supreme Court of the United States

October Term, 1993

MACEO G. WILLIS, JR.,

Cross-Petitioner,

v.

CITY OF CHICAGO,

Cross-Respondent.

Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

JEFFREY E. SCHILLER*
MICHAEL F. BRAUN

SCHUYLER, ROCHE & ZWIRNER, P.C.
130 East Randolph Street
Suite 3800
Chicago, Illinois 60601
(312) 565-2400
Attorneys for Cross-Petitioner

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In *Farrar v. Hobby*, 506 U.S. ___, 121 L. Ed. 2d 494 (1992), this Court held that a prevailing party in a civil rights action who recovers nominal damages is "usually" not entitled to an award of attorney's fees. In her concurring opinion, Justice O'Connor stated that exceptions should be made to this rule where the litigation served an important "public purpose" and where the result of the litigation deterred "future lawless conduct." 121 L. Ed. 2d at 510.

The questions presented are:

1. Whether the Respondent's admission as to the importance of this case to its future course of conduct, as best reflected by its decision to file its own certiorari petition despite its liability of only $1.00 in damages and no attorney's fees, mandates an award of attorney's fees under *Farrar*;

2. Whether the *Farrar* decision, which admonished private attorneys against using the civil rights laws to create "windfalls" for themselves, was ever meant to apply to situations involving court-appointed counsel.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 8

I. ATTORNEY'S FEES SHOULD BE AWARDED UNDER *FARRAR* WHERE THE RESULT ACHIEVED BY CROSS-PETITIONER FINALLY AND DEFINITIVELY PRECLUDED THE REINSTATEMENT OF AN UNCONSTITUTIONAL POLICE PRACTICE 9

II. ATTORNEY'S FEES SHOULD BE AWARDED TO COURT-APPOINTED ATTORNEYS WHO OBTAIN NOMINAL DAMAGE AWARDS FOR THEIR CLIENTS BECAUSE THE POLICY JUSTIFICATIONS SUPPORTING *FARRAR* DO NOT APPLY IN SUCH CASES 14

CONCLUSION 17

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES:

City of Riverside v. Rivera, 477 U.S. 561 (1986) 9, 14

County of Riverside v. McLaughlin, 500 U.S. ___, 114 L. Ed. 2d 49 (1991) 5, 6, 8, 9, 12, 13

Farrar v. Hobby, 506 U.S. ___, 121 L. Ed. 2d 494 (1992) ..... *passim*

Gerstein v. Pugh, 420 U.S. 103 (1975) 4, 6, 7

Grinstead v. Houston County School District, 826 F. Supp. 482 (M.D. Ga. 1993) 10

Paris v. United States Dept. of Housing and Urban Renewal, 988 F.2d 236 (1st Dist. 1993) 10

Robinson v. City of Chicago, 638 F. Supp. 136 (N.D. Ill. 1986), *rev'd on other grounds*, 868 F.2d 959 (7th Cir. 1989), *cert. dismissed*, 493 U.S. 1012 (1989), and *cert. denied*, 493 U.S. 1035 (1990) 4, 8, 10, 11, 13

Willis v. Bell, 687 F. Supp. 380 (N.D. Ill. 1988) 3, 12, 16

STATUTES AND RULES:

42 U.S.C. § 1988 .....2, 3, 9, 14

Rule 3.31 of the United States District Court for the Northern District of Illinois 15

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CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Petitioner, Maceo G. Willis, Jr. ("Cross-Petitioner"), respectfully cross-petitions for a writ of certiorari to review the portion of the judgment of the United States Court of Appeals for the Seventh Circuit in this case denying his entitlement to recover attorney's fees.

OPINIONS BELOW

The opinion of the court of appeals is reported at 999 F.2d 284 (7th Cir. 1993). A. 1a-15a. The opinion of the

district court as to Cross-Petitioner's entitlement to attorney's fees is reported at 784 F. Supp. 1360 (N.D. Ill. 1992). A. 16a-28a.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1993. Cross-Petitioner's petition for rehearing was denied, with one judge voting to rehear the case, on September 23, 1993. A. 29a-30a. On October 28, 1993, the City of Chicago ("City") filed with this Court a petition for a writ of certiorari (No. 93-657) seeking review of a part of the court of appeals' decision.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1988. Proceedings in vindication of civil rights; attorney's fees; expert fees

* * *

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

This case involves the entitlement of an individual who prevailed in a case which, according to the City's own petition for writ of certiorari ("City's Petition"), "is one of considerable importance to law enforcement" [City's Petition, p. 17], and who received an award of nominal damages, to recover attorney's fees under the dictates of 42 U.S.C. § 1988. The district court awarded petitioner $139,350.43 in attorney's fees, and characterized the request as "modest and unexceptionable" under the circumstances of the case. A. 17a. The court of appeals upheld the district court on the liability issue, but reversed on the attorney's fees issue, holding that this Court's decision in *Farrar v. Hobby*, 506 U.S. ___, 121 L. Ed. 2d 494 (1992), "requires" that result. A. 15a.

The underlying facts concerning petitioner's constitutional claim are set forth in a number of places.[1] To avoid needless repetition, this cross-petition will briefly summarize these facts. It will then recount the facts relating to Cross-Petitioner's entitlement to recover attorney's fees.

1. *Cross-Petitioner's constitutional claim.* Cross-Petitioner was arrested at approximately 1:30 p.m. on February 11, 1985. R. 90, pp. 2-3. After Cross-Petitioner was placed in a series of lineups, the assistant State's Attorney approved the filing of charges against Cross-Petitioner

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[1] Examples of these recitations include pages 3-6 of the district court's opinion granting Cross-Petitioner summary judgment on the liability issue (*see Willis v. Bell*, 726 F. Supp. 1118, 1120-21 (N.D. Ill. 1989) ("*Willis*") and pages 2-5 of the court of appeals' decision upholding liability. See A. 2a-4a.

for aggravated criminal sexual assault at 9:00 that night. R. 10, p. 4. Cross-Petitioner's processing was completed by 4:15 a.m. on February 12, 1985, when his fingerprints cleared. *Id.*

Cross-Petitioner's arrest was made without a warrant. R. 90, p. 2. Under such circumstances, an arrestee must be afforded a prompt judicial determination of probable cause before he may be subjected to extended pretrial detention. *Gerstein v. Pugh*, 420 U.S. 103 (1975) ("*Gerstein*"). Cross-Petitioner's judicial determination was delayed until approximately 30 hours after his processing was completed (and some 45 hours after the time of his initial arrest), so that the police could investigate his possible complicity in other crimes committed in another area of the City. R. 90, pp. 4-5. This delay was expressly authorized by the City's "extended-detention" policy, which allowed detention of an arrestee "in order that they [the police] may continue the investigation." R. 90, Exh. 26. No charges were ever brought against Cross-Petitioner for those other crimes. R. 90, p. 5.

On December 10, 1986, Cross-Petitioner filed suit against the City alleging, *inter alia*, that the length of his pre-hearing detention was unconstitutional. R. 1. Six months earlier, the City had formally rescinded its extended-detention policy. A. 12a, n. 2. The recission may have been in response to earlier litigation regarding the constitutionality of the policy. *See Robinson v. City of Chicago*, 638 F. Supp. 136 (N.D. Ill. 1986), *rev'd on other grounds*, 868 F.2d 959 (7th Cir. 1989), *cert. dismissed*, 493 U.S. 1012 (1989), and *cert. denied*, 493 U.S. 1035 (1990) ("*Robinson*"). However, the City continued to assert the constitutionality of its extended-detention policy in

pleadings filed with the district court. It also appealed the *Robinson* decision.

After offering several explanations for the length of Cross-Petitioner's detention, the City finally admitted that it held him past the first available court call pursuant to its extended-detention policy. See R. 102, p. 2, n. 2. The parties then filed cross-motions for summary judgment on the length of detention issue. Just prior to this submission of briefs by the parties, and after the parties had advised the district court of their intention to file cross-motions, the court of appeals reversed the *Robinson* decision on standing grounds without addressing the underlying merits.

On December 4, 1989, the district court granted Cross-Petitioner's motion for summary judgment and denied the City's motion for summary judgment on this issue. The court concluded:

> Both on its face and as applied in this situation, paragraph C-2 violated Fourth Amendment standards by depriving Willis (and others held under like circumstances) of the right to be free from extended-detention without determination of probable cause by a neutral and detached judicial officer.

Willis, 726 F. Supp. at 1124.

Cross-Petitioner's trial on damages was concluded on May 10, 1991 when a jury awarded him nominal damages in the amount of $1.00. R. 170. Immediately thereafter, on May 13, 1991, this Court issued its opinion in *County of Riverside v. McLaughlin*, 500 U.S. ___, 114 L. Ed. 2d 49 (1991) ("*McLaughlin*"). The district court invited

briefing as to the effect of the *McLaughlin* decision on Cross-Petitioner's claim, but ultimately reaffirmed its decision that the City's extended-detention policy was unconstitutional. R. 177, 178.

The City appealed from the judgment against it. The appellate court affirmed the trial court's decision as to the unconstitutionality of the extended-detention policy. It held specifically as follows:

> Contrary to the City's assertions, we do not believe that the delay occasioned here pursuant to the extended-detention policy can be characterized fairly or realistically as a mere administrative step resulting from the practical realities of the criminal justice system. . . . To the extent that the City now argues that it had a right to hold [Cross-Petitioner] until it could build a better case for the denial of bail, it runs afoul of both *Gerstein* and *McLaughlin*.

A. 11a.

2. *The district court's decision on fees.* After the district court entered final judgment for Cross-Petitioner on the length of detention issue, his counsel filed a Petition and Motion for an Award of Attorney's Fees and a Supplemental Attorney's Fees Petition for fees relating to the briefing of the attorney's fees issue. R. 198, 207. The City did not object to any of the specific elements of the lodestar calculation performed by Cross-Petitioner's counsel (*i.e.*, hourly billing rate and hours expended), but sought to reduce or eliminate fees requested on the basis of the nominal damage award which Cross-Petitioner received. R. 204, 208.

The trial court approved Cross-Petitioner's attorney's fees petition in its entirety. A. 24a. In so doing, the court specifically observed:

> Although the requested . . . award . . . would seem large if viewed in a vacuum – and although the ultimate result that counsel obtained for Willis was an award of just nominal damages – the only objective conclusion must be that the Petition is a modest and unexceptionable one. . . .

A. 17a (footnote omitted). The trial court rejected the City's legal arguments. A. 16a-20a. In an appendix to its decision, the trial court noted that it was the City's vigorous defense of its policy, despite its constitutional infirmities under *Gerstein*, which directly led to the amount of fees expended. A. 28a.

On February 10, 1992, following the submission of an uncontested calculation of attorney's fees by Cross-Petitioner's counsel (R. 217), the trial court entered its Order awarding fees in the amount of $139,350.43. R. 218. The City's appeal from the attorney's fees award was consolidated with the City's earlier appeal from the underlying judgment against it.

3. *The appellate court's decision on fees.* Although the court of appeals upheld the district court's decision as to liability, it reversed on the attorney's fees issue. A. 15a. Relying on this Court's decision in *Farrar v. Hobby*, 506 U.S. ___, 121 L. Ed. 2d 494 (1992) ("*Farrar*"), which was decided after the briefing and oral argument in this case, the court of appeals stated that "the result in *Farrar* must control our resolution of Mr. Willis' claim for attorney's fees." A. 14a. It then held that Cross-Petitioner's recovery

of nominal damages precluded an award of attorney's fees to him. Although the appellate court did note that "other factors, including the significance of the holding to other litigants and to the growth of the law" must be taken into account, it rejected the application of these factors to this case. It stated that because the City had formally rescinded the extended-detention policy after the *Robinson* decision, Cross-Petitioner's suit was not the catalyst for changing the City's unconstitutional policy. A. 14a-15a. The court of appeals did not discuss the City's continued assertions that the policy was important to law enforcement, or the possibility that Cross-Petitioner's suit was the catalyst in preventing the policy from being reinstated. *Id.*

Cross-Petitioner filed a Petition for Rehearing with the court of appeals. The petition was denied with one judge voting to rehear. A. 29a-30a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision to deny attorney's fees to Cross-Petitioner is precisely the type of "special and important" decision identified in Rule 10.1 or warranting plenary review by this Court. The *Farrar* decision does not preclude an award of attorney's fees in cases such as this one where Cross-Petitioner's constitutional victory restrained the City from future efforts to detain warrantless arrestees for investigative purposes in violation of the *McLaughlin* decision. By ruling that it does, the court of appeals completely misapprehended the meaning of *Farrar.* If the court of appeals' decision is allowed to stand, it will discourage plaintiffs from "vindicat[ing] important civil and constitutional rights that

cannot be valued solely in monetary terms." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986).

I. ATTORNEY'S FEES SHOULD BE AWARDED UNDER *FARRAR* WHERE THE RESULT ACHIEVED BY CROSS-PETITIONER FINALLY AND DEFINITIVELY PRECLUDED THE REINSTATEMENT OF AN UNCONSTITUTIONAL POLICE PRACTICE.

In *Farrar*, this Court held that a civil rights plaintiff who receives nominal damages is usually not entitled to recover attorney's fees. In her concurring opinion, Justice O'Connor spelled out the circumstances under which such fees should be awarded: where the litigation serves a significant "public purpose", and where it "deter[s] future lawless conduct." 121 L. Ed. 2d at 510. In such instances, Justice O'Connor noted, the fee shifting provisions of 42 U.S.C. § 1988 are "a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available under a private attorney general theory." *Id.* The *Farrar* case, which involved a school owner's complaints about actions taken against him and his school by certain individuals including the Lieutenant Governor of Texas, plainly did not fall under the exceptions delineated by Justice O'Connor.

In this case, which involved a municipal policy rather than individual actions, Cross-Petitioner's lawsuit is, by the City's own admission, of "considerable importance" to the public. City's Petition, p. 17. The City has also acknowledged that it is this case which deters it from

reinstituting its extended-detention policy to permit continued police investigation prior to an initial probable cause hearing. City's Petition, pp. 9, 19. The City has even contended that the outcome of this case will impact upon arrestees, law enforcement personnel, and local governments "throughout the country." City's Petition, p. 20. If there is any case after *Farrar* which permits a nominal damages plaintiff to recover attorney's fees, this is the case.

Indeed, the City's actions, as well as its words, demonstrate its belief in the importance of this case. By filing a petition for certiorari in a case where the City's financial liability is limited to a $1.00 in nominal damages and inconsequential costs, the City has highlighted its belief as to the crucial nature of the constitutional principal at issue.

This case fits squarely within the exception enunciated in *Farrar*. This exception has often been referred to as the "catalyst rule."[2] To be a catalyst in affecting defendant's actions, "[t]he suit need not be the sole cause but must play a 'provocative' role or be a 'competent producing cause.' " *Paris v. United States Dept. of Housing and Urban Renewal*, 988 F.2d 236, 241 (1st Dist. 1993). Here, the City has admitted that Cross-Petitioner's suit was the cause of the City's inability (at least after *Robinson* was reversed in 1989) to detain arrestees in a manner which it deemed permissible. By its concessions, including those about the "considerable importance" and "critical" nature

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[2] *See also Paris v. United States Dept. of Housing and Urban Renewal*, 988 F.2d 236, 241 (1st Dist. 1993); *Grinstead v. Houston County School District*, 826 F. Supp. 482 (M.D. Ga. 1993).

of this lawsuit (City's Petition, pp. 17, 19), the City has mandated a finding that attorney's fees should be awarded under *Farrar*.

The court of appeals' conclusion that Cross-Petitioner's victory was *de minimus* because the City rescinded its extended-detention policy approximately six months before Cross-Petitioner commenced this litigation (A. 14a) ignores the effect that subsequent history had on the City's position. It is clear that although the City may have initially rescinded its policy because of the *Robinson* decision, its final decisions concerning the use of the policy were not set until this case firmly and finally declared the policy unconstitutional.

To put this in context, once the Seventh Circuit reversed *Robinson* in 1989, the City plainly considered itself to be free of the consequences of the district court's decision in that case. The City's pleadings throughout this case make that point abundantly clear. In the district court, the City characterized as a "misrepresentation" Cross-Petitioner's assertion that the City's extended-detention policy had been previously declared facially unconstitutional by the district court. R. 94, p. 2. The City contended that:

> Moreover, the District Court's judgment[s] in . . . *Robinson* [has] been reversed by the Seventh Circuit, and it is beyond dispute that the effect of reversal is to abrogate the trial court's judgment and leave the case as it stood prior to judgment.

R. 94, pp. 2-3.

The district court's summary judgment opinion in this matter stated in clear terms the constitutional invalidity of the City's extended-detention policy. *Willis*, 726 F. Supp. at 1124-27. In so doing, it put an end to the City's ability to assert its freedom to reinstitute that policy.

This Court's decision in *McLaughlin* triggered a whole new round of claims by the City that its extended-detention policy was constitutional and could be applied in future detention situations. R. 175. Once again, the district court rejected the City's assertion. R. 177, 178. This decision precluded the City from reinstituting its extended-detention policy pending appellate review.

The court of appeals' decision again exercised preclusive effects on the City's policy detentions. The City's Petition for Certiorari on the liability issue expressly noted:

> The decision below strikes down an appropriate investigative practice that enables the authorities to make responsible charging and bail determinitives.

City's Petition, p. 19. Similarly, it states that "[t]he decision below . . . invalidates an investigative practice. . . ." City's Petition, p. 9. There can be absolutely no doubt but that the City felt that it could have, and would have, reinstituted its policy (or a variant thereof) were it not for the decisions in this case.

The bottom line is that while the City may have formally rescinded its extended-detention policy before Cross-Petitioner filed suit, the City persisted in its view that the extended-detention policy was constitutional and

that its practice of detaining arrestees to investigate other possible criminal activity was lawful.[3] Plainly, it was this case which precluded the City from reinstituting its policy after the court of appeals reversed the district court's decision in *Robinson*. Just as plainly, it was this case which continued to preclude the City from reinstituting its policy after this Court decided *McLaughlin*.

This litigation is, thus, unlike Justice O'Connor's description of the litigation in *Farrar*:

> Such a judgment cannot deter misconduct any more than a bolt of lightning can; its results might be devastating, but it teaches no valuable lesson because it carries no discernable meaning.

Farrar, 121 L. Ed. 2d at 510 (O'Connor, J., concurring). The district court's ruling, and the appellate court's affirmance of that ruling, carries the clearly discernable message that the police cannot detain an arrestee without providing a prompt judicial determination of probable cause and that this prohibition applies even where the reason for the detention is to investigate an unrelated crime or set of crimes. This litigation was thus not merely about money; it was about establishing definitively that

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[3] It was for this very reason that the City refused to make a F.R.Civ.P. 68 offer of judgment. In its Seventh Circuit brief on attorney's fees ("City's Brief"), the City stated that such an offer "would have required the City to consent to judgment in a case in which the District Court had held a City policy unconstitutional, thus forfeiting the right to appeal that ruling." City's Brief, p. 20, n. 11. This reluctance, which could have shut off plaintiff's attorney's fees, demonstrates the City's firmly entrenched view as to the constitutionality of its policy.

arrestees could not be held without a probable cause hearing while the police conducted further investigation to determine if probable cause existed for other, uncharged crimes.

Cross-Petitioner was not simply a prevailing party under *Farrar*, he was a party entitled to an award of attorney's fees for having obtained a ruling that the City could not detain arrestees for purpose of investigating their suspected involvement in other crimes. This Court should reverse the ruling of the court of appeals on the attorney's fees issue.

II. ATTORNEY'S FEES SHOULD BE AWARDED TO COURT-APPOINTED ATTORNEYS WHO OBTAIN NOMINAL DAMAGE AWARDS FOR THEIR CLIENTS BECAUSE THE POLICY JUSTIFICATIONS SUPPORTING *FARRAR* DO NOT APPLY IN SUCH CASES.

Underlying this Court's decision in *Farrar* was the Court's concern that Section 1988 was being used to "produce windfalls to attorneys." *Farrar*, 121 L. Ed. 2d at 506 (quoting *City of Riverside v. Rivera*, 477 U.S. 561, 580 (1986) (plurality opinion), which, in turn, was quoting S. Rep. No. 94-1011, p. 6 (1976)). As Justice O'Connor observed in her concurring opinion, "Section 1988 is not 'a relief Act for lawyers.' " *Farrar*, 121 L. Ed. 2d at 510 (O'Connor J., concurring)(quoting *City of Riverside v. Rivera*, 477 U.S. 561, 588 (1986)(Rehnquist, J., dissenting)). Plainly, the Court sought to prevent private attorneys from perverting the civil justice system by and through the filing and maintaining of lawsuits which are likely to yield *de minimus* results and large-scale fee expenditures.

121 L. Ed. 2d at 510. In that context, *Farrar* sent a powerful message to plaintiff's counsel in civil rights cases – evaluate your case at the outset, and do not pointlessly pursue unimportant cases if the goal of such suits is to obtain attorney's fees. In those cases, such fees will not be forthcoming.

These concerns play no role where, as here, counsel was appointed and did not seek the representation. Cross-Petitioner's counsel were not provided an opportunity to make the type of cost-benefit analysis which typically occurs in deciding whether to undertake the representation of a client and which is demanded of non-appointed counsel under *Farrar*. Instead, Cross-Petitioner's counsel were assigned the representation (pursuant to Rule 3.31 of the U.S. District Court for the Northern District of Illinois (see A. 31a)) and was exposed to substantial economic risk (*i.e.*, no win, no fee recovery) as part of their professional duty. As is clear from the record, appointed counsel vigorously pursued Cross-Petitioner's extended-detention claim and prevailed on that claim both at trial and on appeal. The City waged an all-out war in defense of its policy, despite its representation (both in the trial court and on appeal) that the policy had been rescinded. Having expended time and effort on behalf of Cross-Petitioner and having successfully overcome the City's repeated efforts to protect its extended-detention policy, the award of attorney's fees to Cross-Petitioner's attorneys was neither a "windfall" nor "relief." Rather, it recognized that the time and effort expended litigating on Cross-Petitioner's behalf could, but for the court's appointment in this matter, have been

dedicated to work performed for counsels' customary, non-appointed, paying clients.

The trial court recognized this very point in the appendix to its attorney's fees opinion. A. 26a, n.2. Specifically, the trial court found that the appointment of counsel was often of benefit to everyone but the appointed counsel. *Id.* In this case, the district court found Cross-Petitioner's counsel to have performed "high-quality work" (A. 17a.) and to have acted "in the best traditions of the legal profession." *Willis*, 687 F. Supp. 380, 387, n. 8 (N.D. Ill. 1988). If *Farrar* is applied to a situation such as this, i.e., where counsel is appointed to prosecute a case where a violation has occurred which warrants nominal damages relief, the end result is to punish, rather than reward, the practitioner who vigorously pursues his responsibilities and obtains a favorable result.

A determination of appointed counsel's rights and responsibilities in a case such as this one is precisely the type of "special and important" issue which this Court should address. As a matter of fundamental fairness, awarding attorney's fees to Cross-Petitioner's counsel is appropriate and proper. The principles that produced the *Farrar* decision need not and should not apply in the context of appointed counsel.

CONCLUSION

The cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

MACEO G. WILLIS, JR.

JEFFREY E. SCHILLER*
MICHAEL F. BRAUN
SCHUYLER, ROCHE & ZWIRNER
130 East Randolph Street
Suite 3800
Chicago, Illinois 60601
(312) 565-2400
Attorneys for Cross-Petitioner

*Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 91-2528 & 92-1592

MACEO G. WILLIS, JR.,

Plaintiff-Appellee,

v.

CITY OF CHICAGO

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 86 C 9589 – Milton I. Shadur, *Senior Judge.*

ARGUED NOVEMBER 10, 1992 – DECIDED JULY 30, 1993

Before POSNER and RIPPLE, *Circuit Judges,* and CRABB, *Chief District Judge.**

RIPPLE, *Circuit Judge.* Maceo Willis, Jr. was arrested on charges of sexual assault. Pursuant to Chicago Police Department policy, Mr. Willis was held for an extended period of time without a judicial determination of probable cause so that the police could investigate other crimes that they suspected Mr. Willis had committed. Mr. Willis brought this action against the City of Chicago. He

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*The Honorable Barbara B. Crabb, of the Western District of Wisconsin, is sitting by designation.

alleged that his constitutional rights had been violated by the City's extended detention policy. The district court granted summary judgment to Mr. Willis and then determined that he was a "prevailing party" under 42 U.S.C. § 1988 and ordered the City to pay Mr. Willis' attorneys' fees. The City of Chicago now appeals from both determinations of the district court. We affirm in part and reverse in part.

I

BACKGROUND

A. *Facts*

On the morning of February 11, 1985, Chicago police officers arrived at Mr. Willis' place of employment and met with Mr. Willis in the personnel office. Based on witness information and a computerized crime pattern analysis, the officers suspected him in connection with a series of aggravated sexual assaults. Although they did not have a warrant for Mr. Willis' arrest, the officers convinced him to return with them to Area 3 Violent Crimes Police Headquarters (Area 3). On the way to the police station, one of the officers advised Mr. Willis of his rights and, once they neared their destination, the officer placed Mr. Willis in handcuffs.

The officers and Mr. Willis reached Area 3 at approximately 11:00 a.m. and the officers began to question him regarding the assaults and to telephone victims to arrange for them to view him in a lineup. During this time, other police units were contacted, including Area 2 Violent Crimes Headquarters (Area 2), so that the police

could determine whether Mr. Willis was a suspect in any other crimes. From approximately 4:00 p.m. to 7:00 p.m., Mr. Willis participated in a series of lineups at Area 3. He was identified by numerous witnesses as having committed several acts of aggravated criminal sexual assault. Supported by these identifications, the Assistant State's Attorney approved filing charges against Mr. Willis. Meanwhile, police officers in Area 2 had determined that Mr. Willis fit the description of a perpetrator of a series of sexual assaults in that section of the city. At approximately 11:00 p.m., Mr. Willis was taken to the District 9 police station lockup. The processing of charges against him was completed at 4:15 a.m. on February 12, 1992, when the results of a fingerprint check were received by the station.

Because February 12 was Lincoln's Birthday, a special holiday court schedule was in effect. The felony court call for arrestees to appear in front of a neutral judicial officer was scheduled for 9:30 a.m. that morning. Although Mr. Willis had already been booked on the charges arising out of the Area 3 police investigation, he was not taken to that court call for a probable cause determination because he was considered a suspect in the additional Area 2 crimes. The police wished to conduct additional investigations into the Area 2 crimes.

In the early afternoon of that same day, Mr. Willis was transported to Area 2 for lineups relating to the assaults in which Area 2 police considered him a suspect. Because the police, however, were unable to find other men similar in appearance to Mr. Willis, the lineups were not conducted. A victim of one of the crimes was instead shown a photo array that included a picture of Mr. Willis;

the victim was unable to make a positive identification. No arrest warrant was ever issued against Mr. Willis for any of the Area 2 crimes, and he was never charged with any of those crimes.

On February 13, at approximately 9:30 a.m., Mr. Willis was taken before a neutral judicial officer for a bail hearing. Bail was set at three hundred thousand dollars, which Mr. Willis was unable to post. Later that same day, he was indicted by a grand jury on four counts of aggravated criminal sexual assault.

At the time of Mr. Willis' arrest, the Chicago Police Department's general policy relating to the processing of arrestees was set forth in General Order 78-1. It was the Department's policy to bring arrestees to the first available court call after completion of processing. There were, however, established exceptions to this general rule. Paragraph C-2(a) stated that

> [i]n the event Criminal Investigation Division personnel ascertain that there is a necessity for the detention of an arrestee for a period of time longer than that which might routinely be expected, in order that they may continue the investigation, a request for such detention will be made by the unit commanding officer or the area coordinator to the watch commander of the facility where the arrestee is detained.

R.90, Ex.26 at 9. The City acknowledges that Mr. Willis was held past the February 12 holiday court call pursuant to this extended detention policy so that Mr. Willis' possible involvement in the Area 2 crimes could be investigated.

B. *District Court Proceedings*

On December 10, 1986, Mr. Willis filed a complaint against the City and various police officers, alleging numerous constitutional violations and state law claims. Ultimately, however, Mr. Willis' suit consisted of two issues: (1) whether the City violated his Fourth Amendment[1] rights by detaining him for an undue length of time pursuant to an extended detention policy and prior to receiving a judicial probable cause hearing and (2) whether two of the City's police officers had denied him food and the use of a bathroom during a twelve-hour period of his detention.[2] Mr. Willis and the City filed motions for summary judgment on the extended detention issue and the district court granted summary judgment to Mr. Willis. Basing its decision on *Gerstein v. Pugh*, 420 U.S. 103 (1975), the court held that, on its face and as applied, the City's detention policy violated Mr. Willis' Fourth Amendment right to a prompt judicial determination of probable cause. *Willis v. Bell*, 726 F. Supp. 1118, 1124 (N.D. Ill. 1989). The claim regarding the conditions of Mr. Willis' detention was then submitted to a jury.

On May 10, 1991, a jury found in favor of the defendant police officers regarding the conditions of detention.

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[1] Our opinion will refer throughout to the Fourth Amendment rather than to the Fourth and Fourteenth Amendments. Although this is technically imprecise because the Fourth Amendment by itself applies to federal and not state or municipal actors, we shall continue a conventional and convenient practice. *See Marshall v. Allen*, 984 F.2d 787, 789 n.1 (7th Cir. 1993).

[2] The jury found for defendants on this claim and the resolution of this issue is not in contention on this appeal.

The jury also awarded nominal damages of one dollar (the minimum amount it could award) to Mr. Willis for the unconstitutional length of detention. Three days later, the Supreme Court decided *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991), in which the Court gave guidance for determining when a delay in receiving a *Gerstein* probable cause hearing is unconstitutional. The City filed a motion to vacate judgment based on the rationale in *McLaughlin*, but the district court concluded that the Supreme Court's decision did not support the extended detention policy and thus *McLaughlin* did not change the outcome of Mr. Willis' case.

Subsequently, Mr. Willis contended that he was a "prevailing party" as defined under 42 U.S.C. § 1988 for purposes of an award of attorneys' fees under that statute. While the City did not object to the calculation of the fees, it did object to their imposition. The court found Mr. Willis to be a prevailing party and, after independently reviewing the fees and noting that they had been discounted to take into account claims upon which Mr. Willis had not prevailed, the district court found Mr. Willis' requested figure to be reasonable. On February 10, 1992, the court awarded $139,350.43 in attorneys' fees to Mr. Willis. The City now appeals both the district court's finding of unconstitutional detention and the award of attorneys' fees. This court has consolidated the City's appeals.

II

ANALYSIS

A. *The Constitutionality of Mr. Willis' Extended Detention*

In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Supreme Court held that, following a warrantless arrest, the Fourth Amendment requires a prompt judicial determination of probable cause before an arrestee may be subjected to extended pretrial detention. This holding acknowledges that prolonged pretrial detention occasions serious interference with liberty rights. *Id.* at 114. A judicial assessment of probable cause is thus necessary to guard against illegitimate interference with those rights. In *County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1668 (1991), the Court noted that *Gerstein* sought to balance the law enforcement interest in taking suspected criminals into custody, even when there has been no opportunity for a prior judicial determination of probable cause, against the possibility that detention founded upon an incorrect suspicion of wrongdoing may adversely affect the arrestee's job, income, and family relationships. Thus, *Gerstein* was a " 'practical compromise' between the rights of individuals and the rights of law enforcement." *McLaughlin*, 111 S. Ct. at 1668.

In *McLaughlin*, the Supreme Court defined the "promptness" requirement of *Gerstein*. The Court acknowledged that, because *Gerstein* allows the incorporation of judicial probable cause determinations into other pretrial procedures, some types of delay are simply unavoidable. *McLaughlin*, 111 S. Ct. at 1669. Thus, the regular problems confronting police when processing

arrestees through the overcrowded criminal justice system may give rise to delays that are not deemed to violate the Fourth Amendment. *Id. McLaughlin* stated that a policy providing for a judicial probable cause determination within 48 hours of a suspect's arrest will generally satisfy the *Gerstein* promptness requirement. *Id.* at 1670. Even if a probable cause determination is provided within 48 hours of arrest, however, such a hearing may still violate the Constitution "if the arrested individual can prove that his or her probable cause determination was delayed unreasonably." *Id.; accord Bostic v. City of Chicago*, 981 F.2d 965, 968 (7th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3864 (U.S. June 28, 1993) (No. 92-1746).

Some delays are unavoidable because of the practical realities of the criminal justice system. "[T]ransporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, [and] obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest" are all examples of situations in which delays in presentment are reasonable. *McLaughlin*, 111 S.Ct. at 1670. While delays caused by the realities of the criminal justice system may be considered reasonable ones, the Court also noted that some delays are patently unreasonable. "[D]elays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake" are all examples of illegitimate reasons to delay a judicial determination of probable cause. *Id.*

In the present case, the Chicago police held Mr. Willis for approximately 45 hours before he was given a probable cause hearing. *See* R.102 at 5. As noted above, such a

delay generally complies with *Gerstein*. The parties here, however, disagree as to whether the delay in presenting Mr. Willis to a magistrate for a probable cause determination, pursuant to the extended detention provision, can be considered a reasonable delay under the teaching of *McLaughlin*.

Mr. Willis nevertheless argues that the delay in bringing him before a judicial officer was unreasonable. He notes that *McLaughlin* tolerates only administrative or procedural delays that are reflective of the practical realities of the criminal justice system. Mr. Willis stresses that the delay in his case was not caused by such concerns. Mr. Willis was processed on the Area 3 charges in time to be presented at the next available court hearing, the February 12, 9:30 a.m. holiday court call. Instead, under the extended detention policy, the police chose to delay his initial hearing in order to conduct an investigation on a different set of crimes than those for which he had been arrested. Because the City subjected him to a "self-induced, non-administrative" delay, Mr. Willis asserts that the delay was unreasonable and thus violated the Fourth Amendment. Appellee's Br. at 16.

In reply, the City maintains that the delay occasioned by Paragraph C-2 of the detention policy was a reasonable investigative delay. It notes that Mr. Willis was not held beyond the February 12 court call so that the Area 3 crimes for which he had been arrested could be investigated further. *McLaughlin* would clearly prohibit such a presentment delay because it would be for the purpose of gathering evidence to justify the arrest. 111 S. Ct. at 1670. Here, however, the City claims that the delay was not

improper because the police were not attempting to buttress a probable cause determination on the Area 3 charges.

Instead, the City contends, investigation of other separate crimes is a reasonable cause for delay. Detaining Mr. Willis to investigate the alleged Area 2 crimes was simply an administrative step, the City asserts, necessary to ensure that the prosecutor and the magistrate made well-informed charging the bail decisions. *See* Appellant's Br. at 20. Had the Area 2 lineup taken place or had the Area 2 witness identified Mr. Willis from the photo array, such information would have been relevant to the charging decision, bail determination, and potential conditions for release. The City asserts that, similar to post-arrest interviews designed to elicit an arrestee's name and address, investigation of other alleged crimes is an administrative step in the arrest process to garner necessary information about an arrestee. Therefore, it contends, the delay caused by such investigation is reasonable.

We believe that the Supreme Court's decision in *McLaughlin* makes Mr. Willis' contentions more tenable than the arguments of the City and that, unlike the plaintiff in *Bostic*, Mr. Willis has demonstrated convincingly the unreasonableness of his prolonged detention. Processing on the Area 3 charges for which he had been arrested was completed in ample time for Mr. Willis to appear at the February 12 court call. The parties agree that he was detained solely to permit the police to place him in lineups relating to other uncharged crimes. The arrest yet to be judicially scrutinized was used as an opportunity to build a separate case against him. While such delay is not explicitly mentioned as unreasonable in *McLaughlin*, the

Court's opinion, in our view, leaves little doubt as to the appropriate course. The Court condemned delays for the purpose of "gathering additional evidence to justify the arrest" as unreasonable and thus determined them to be an illegitimate basis for postponing a judicial determination of probable cause. 111 S. Ct. at 1670. The delay to which Mr. Willis was subjected is certainly analogous. In both circumstances, a person is subjected to unreasonably prolonged custody without judicial scrutiny so that the police can undertake further investigatory steps that require the presence of the defendant, a presence that cannot properly be required without a prior judicial determination of probable cause.

Contrary to the City's assertions, we do not believe that the delay occasioned here pursuant to the extended detention policy can be characterized fairly or realistically as a mere administrative step resulting from the practical realities of the criminal justice system. If, as the City now contends, the police already had probable cause for the Area 2 lineups, that information could have been provided to the magistrate along with the information furnished with respect to the Area 3 offenses for which Mr. Willis had been arrested.[3] In any event, while the

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[3] On appeal, the City also argues that, even before the proposed Area 2 lineups, it had probable cause for the arrest of Mr. Willis for those crimes and that, therefore, it cannot be said that he was being held for a crime on which the police lacked probable cause. This argument has a distinct circular quality to it. The whole point is that there never was a judicial determination of probable cause with respect to these crimes. In any event, the City never makes clear the basis for its post facto assertion that probable cause existed before the victim's attempted identification.

status of the Area 2 investigation was certainly relevant to the magistrate's bail determination[4] on the Area 3 offenses, this factor does not justify denying Mr. Willis his prompt hearing. The magistrate could have been informed of the status of the Area 2 investigation at the bail hearing and could have factored this consideration into the determination. To the extent that the City now argues that it had a right to hold Mr. Willis until it could build a better case for the denial of bail, it runs afoul of both *Gerstein* and *McLaughlin*.

B. *Availability of Attorneys' Fees under 42 U.S.C. § 1988*

The district court found that Mr. Willis was a "prevailing party" under 42 U.S.C. § 1983 and that he was thus entitled to attorneys' fees under § 1988 of that title. The court approved Mr. Willis' fee petition in its entirety. However, while this case has been under submission in this court, the Supreme Court decided *Farrar v. Hobby*, 113 S. Ct. 566 (1992), which clarified the status of a "prevailing party" for purposes of § 1988 attorneys' fees and delineated the factors that should be considered in fixing a reasonable fee award.

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[4] We cannot accept the City's suggestion that the extended detention policy was written to permit delay only when it was necessary to make informed charging and bail decisions. The very broad language of the policy belies such an interpretation. It allows detention of an arrestee for an unspecified period whenever Criminal Investigation Personnel believe that an investigation ought to continue.

In *Farrar*, the defendants were found guilty of violating the plaintiffs' constitutional rights, but the jury did not find that the plaintiffs had suffered any compensable injury from these violations. *Id.* at 570. Instead of receiving their requested seventeen million dollars in damages, the plaintiffs were awarded nominal damages of one dollar. They then sought attorneys' fees under § 1988 as prevailing parties. In its review, the Supreme Court held that a plaintiff is a prevailing party when the actual relief "on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 573. Because the entry of a nominal damages award is neither the entry of judgment for the defendant on the merits nor a declaration of the defendant's legal immunity to suit, the Court held that a plaintiff who wins nominal damages is a prevailing party under § 1988. *Id.*

Despite the determination that the plaintiff in *Farrar* was a prevailing party, the Court stated that the overall success of the plaintiff's claim, however, is the most critical factor in determining the reasonableness of a fee award. "Although the 'technical' nature of a nominal damages award or any other judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under § 1988." *Id.* at 574. Because the plaintiffs in *Farrar* had gained little more than a moral victory instead of the seventeen million dollars in damages that they had requested, the Supreme Court held that the only reasonable fee for such a judgment is no fee at all. The Court stated that

> [i]n a civil rights suit for damages, however, the awarding of nominal damages also highlights

> the plaintiff's failure to prove actual, compensable injury. . . . When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all.

Id. at 575 (citation omitted). Thus, although the *Farrar* plaintiffs were prevailing parties, they were not awarded attorneys' fees.

We believe that the result in *Farrar* must control our resolution of Mr. Willis' claim for attorneys' fees. In Count II of his Third Amended Complaint, Mr. Willis sought actual damages and one million dollars in punitive damages from the City for its violation of his Fourth Amendment rights. Although he prevailed on his constitutional claim, the jury awarded Mr. Willis only one dollar in nominal damages. Thus, as noted in *Farrar*, "[t]his litigation accomplished little beyond giving petitioners the moral satisfaction of knowing that a federal court concluded that their rights had been violated in some unspecified way." *Id.* at 574 (citation omitted). While courts must certainly also take into consideration other factors, including the significance of the holding to other litigants and to the growth of the law, *see Farrar*, 113 S. Ct. at 578, Mr. Willis' litigation did not cause the Police Department to rescind the extended detention policy. Mr. Willis filed suit on December 10, 1986, approximately six months after the Department had invalidated the policy.[5]

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[5] The district court noted in its opinion that the extended detention policy had been rescinded in June 1986. *Willis v. Bell*, 726 F. Supp. 1118, 1124 n.16 (N.D. Ill. 1989). The rescission may

Thus, his legal action cannot be deemed to have instigated the revocation of the extended detention policy. *Cf. Pembroke v. Wood County*, 981 F.2d 225, 231 n.27 (5th Cir. 1993) (holding that although plaintiffs received no money damages, their suit caused the improvement of prison conditions and thus they were entitled to attorneys' fees), *cert. denied*, 61 U.S.L.W. 3831 (U.S. June 14, 1993) (No. 92-1744). Mr. Willis' victory was limited to a recognition that his constitutional rights had been violated by the City and to a nominal award of one dollar. *Farrar* requires that we reverse the district court's award of attorneys' fees.

Conclusion

For the foregoing reasons, we affirm the district court's decision in part and we reverse in part.

AFFIRMED IN PART AND
REVERSED IN PART.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

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have been in response to earlier litigation also regarding the constitutionality of the policy. *See Robinson v. City of Chicago*, 868 F.2d 959, 962 (7th Cir. 1989), *cert. dismissed*, 493 U.S. 1012 (1989), and *cert. denied*, 493 U.S. 1035 (1990).

Maceo WILLIS, Plaintiff,

v.

Ernest BELL, et al.,[1] Defendants.

No. 86 C 9589.

United States District Court,
N.D. Illinois, E.D.

Jan. 31, 1992.

MEMORANDUM OPINION
AND ORDER

SHADUR, District Judge.

This case is now on appeal from a jury verdict in which nominal damages of $1 were awarded to plaintiff Maceo Willis ("Willis") for a violation of his constitutional rights – a matter on which this Court had earlier ruled in Willis' favor on a motion for summary judgment as to liability (726 F.Supp. 1118 (N.D.Ill.1989)). As in every civil rights action in which a plaintiff has prevailed in whole or in part under 42 U.S.C. § 1983 ("Section 1983"), this final chapter involves the determination of attorneys' fees awardable under 42 U.S.C. § 1988 ("Section 1988"). This opinion will not rehearse all that has gone before in this bitterly fought litigation, limiting itself instead to what is essential to resolution of the fee dispute.

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[1] Although all claims against first-named defendant Ernest Bell were dismissed during the course of the litigation, this opinion adheres to the original case caption.

Positions of the Parties

Appointed counsel for Willis have – just as they did in the course of their high-quality work on the merits in representing their client – performed an extraordinary task in paring their fee petition (the "Petition") to an absolute minimum so as to be invulnerable to attack in any of the respects in which such requests are frequently suspect. Although the requested base award of $105,399.50 (exclusive of the appropriate adjustment for the time value of money) that covers counsel's work through August 31, 1991, plus $6,136 for their preparation of the fee Petition and briefing on that subject, would seem large if viewed in a vacuum[2] – and although the ultimate result that counsel obtained for Willis was an award of just nominal damages – the only objective conclusion must be that the Petition is a modest and unexceptionable one (subject only to the determination of the legal questions that are addressed in this opinion).

Indeed, the Petition and Motion for an Award of Attorneys' Fees is truly a model of its kind, reflecting the most meticulous attention to all the relevant standards. Its approach to the lodestar calculation reflected a reduction in hours that, if anything, understated the time actually chargeable in the area as to which Willis was the "prevailing party" for Section 1988 purposes – the Petition must be read to appreciate the care and attention that went into its preparation. And its hourly rates for all three lawyers involved (lead counsel Jeffrey Schiller, his

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[2] See Appendix.

principal associate Michael Braun and supervising partner Robert Case) are well within the reasonable range for lawyers of such experience and skill (indeed, a billing at higher hourly rates would not be out of line in market terms). Finally, though the few hours devoted by two summer associates have been included at rates somewhat above what this Court has approved in other cases for persons who do lawyer-type work but who are not yet admitted to the bar, those rates too are supported by the expert opinion of Jenner & Block partner Michael Brohman – and they too were not objected to by defendant City of Chicago ("City").[3]

In sum, the lodestar figure (the product of hours times hourly rates) was eminently reasonable. Its reasonableness, a decision independently reached by this Court, is reinforced by City's frank acknowledgement in its responsive Mem. 1 (footnote omitted) and 5:

> City does not object to the award of attorney's fees in the amount of $60,374.50 for those hours expended up to award of summary judgment and for post trial review of the decision in *County of Riverside v. McLaughlin* [___ U.S. ___, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991)] and the preparation of the bill of costs. Furthermore, City does not object to the billing rates of any of the attorneys involved. City does not object to any of the attorney's fees sought prior to the award of summary judgment to plaintiff and including fees sought for the preparation of the

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[3] Those hours represented less than 7% of the total time spent and less than 4% of the total dollar charges reflected in the Petition.

> bill of costs and the fee petition as these are reasonable.[4]
>
> * * *
>
> City has no objection to the hourly rates of the attorneys involved. Nor is there any objection to the method of calculating the amount of fees sought for which plaintiff relies on *Hensley [v. Eckerhart]*, 461 U.S. [424] at 434 [103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983)]. (Plaintiff's memorandum, p. 8).
>
> City has no objection to an adjustment for the delay in collecting fees by the method the Court prefers. (Plaintiff's memorandum, p. 8-9).

And the same is true as to counsel's supplemental application for $6,136, on which the opposing sets of lawyers reached a commendable compromise agreement and thus avoided any wasteful fees-on-fees contest (once again the Supplemental Petition should simply be read for its lucid explanation of the cutback that it reflected and the nature of the parties' agreement).

Initially City objected only in these terms (City Mem. 2):

> While plaintiff prevailed in this litigation by receiving a summary judgment, subsequent to the entry of that judgment, extensive legal services were performed in connection with a trial which failed to alter the legal relationship between the parties. . . . Because plaintiff only

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[4] [Footnote by this Court] That was City's original position. As discussed later in this opinion, it later retreated from that partial approval – but on an issue of law, *not* a quarrel as to the hours spent or the hourly rates.

> partially prevailed, City objects to award of attorney's fees after the award of summary judgment in the amount of $45,025 relating to all trial work.

That objection was based on its contention that the efforts of Willis' lawyers could be carved up into slices based on the different stages of the litigation involved. Ultimately City backed away from its original partial approval, relying on *Estate of Farrar v. Cain*, 941 F.2d 1311 (5th Cir.1991) to object to *any* fee award at all.

Application of the Relevant Standards

In light of the manner in which counsel have distilled the issues so that this case poses only narrow areas of controversy, this Court need not go through the primer on fee award principles that is so often necessary in the judicial treatment of Section 1988 cases. Apart from City's *Farrar*-inspired opposition to the award of even $1 in fees, it is necessary only to focus on its contention that plaintiff failed completely on the only issue at trial against City and hence was not a "prevailing party" under Section 1988.

It takes only a brief analysis to recognize the legal poverty of that argument. When this Court granted summary judgment in Willis' favor as to *liability* on one of his claims (the only one on which he ultimately prevailed, and the only one for which his appointed counsel have therefore sought a fee award – they have leaned over backward to separate out and exclude all time devoted to the rest of the case), he had nothing that he could enforce. There was no *judgment* in his favor. Quite apart from the

possibility that this Court might change its view before the time for such a final judgment would actually arrive.[5] Willis and his counsel *had* to proceed to trial in order to obtain any enforceable relief. If City wanted to stop the bleeding – to avoid any further accrual of liability for fees – it could have made a Fed.R.Civ.P. ("Rule") 68 offer (as was done in *Marek v. Chesny*, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985), ultimately upholding the decision on that score by this Court, 547 F.Supp. 542, 545-48 (N.D.Ill.1982), after it had been reversed in that respect by our Court of Appeals, 720 F.2d 474 (7th Cir.1983)).

To be sure, any such Rule 68 offer carries the "risk" that it may be accepted – and that acceptance would have meant City's giving up its right to appeal this Court's ruling of liability.[6] But having chosen not to make any

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[5] Usually any such prospect represents nothing more than a theoretical illustration of the basic principle that only a final judgment establishes the jural relationship between the parties, with interim orders of the court always being open to revision until then. In this instance, though, the potential for the entry of a different judgment was very real and not merely hypothetical: After the trial this Court requested the parties to brief the impact of the intervening Supreme Court decision in *County of Riverside v. McLaughlin*, ___ U.S. ___, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). Indeed City itself made that very point about earlier nonfinality at page 3 of its Memorandum in response to that request by this Court. And this Court agreed with City's argument that the *County of Riverside* ruling had to be considered in this case precisely because there had been *no* final judgment entered here before the issuance of the Supreme Court's decision in that case.

[6] That prospect, however, was not an inevitable one. It is entirely possible that the exercise of some ingenuity in City's presentation and discussion of a Rule 68 offer could have

such offer, and thus having forced Willis to go the full trial route before he could become a "prevailing party" in the legal sense, City cannot in good conscience make an argument that the services that it now disputes were not an essential and integral part of Willis' attainment of such "prevailing party" status.[7]

City can invoke only a distorted reading of the controlling cases – *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) and *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989) – in support of its insupportable position. Those cases' references (1) to cutting away the time spent on unsuccessful discrete claims from a Section 1988 fee award (*Hensley*) and (2) to requiring a change in the legal relationship of the parties as a precondition to prevailing party status (*Garland*) cannot reasonably be made to do the job for City. Nor is City assisted at all by its citation to this Court's opinion in *Levka v. City of Chicago*, 605 F.Supp. 197, 199 (N.D.Ill.1985), which is also

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preserved City's right of appeal while at the same time limiting its exposure on further fees related to the issue on which partial summary judgment had been entered. That however would have involved a negotiated without-prejudice arrangement, requiring agreement on both sides, so that this opinion does not in any way rely on any such possibility.

[7] In effect the kind of argument that City now advances would really undercut Rule 68 by creating a kind of judicial oneway variant on that Rule. Defendants would then be able to avoid actually making an offer of judgment, while still gaining the benefit of cutting off all future accrual of awardable fees.

wholly beside the mark, entirely inapplicable to the situation that was presented in this case.[8]

That leaves only *Farrar,* on which City originally relied for its untenable bifurcated approach and on which it now relies for its argument that Willis' Petition should be denied in its entirety. That is indeed an accurate reading of *Farrar* – but this Court will leave that maverick decision back in Texas, where it came from and where it belongs. *Farrar,* 941 F.2d at 1316 acknowledges that it stands alone for its position, in conflict with fully six other Courts of Appeals including our own.[9] No one in

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[8] *Levka* rejected a Section 1988 award for services rendered in the appellate phase of that case. There the appeal had ended in plaintiff's being *worse* off than before, because the Court of Appeals had ordered a remittitur halving plaintiff Levka's damage award. Willis'R.Mem. 7 n. 5 correctly points out that extending such a holding to the present situation would be analogous to treating a prevailing plaintiff who is successful in obtaining an *affirmance* on appeal (and who thus does not *improve* his or her position but simply stands still – no better and no worse off, but having had to work hard in order to maintain that status quo) as not being a "prevailing party" on the appeal – for to paraphrase City's argument about Willis here in terms of that conceptually comparable situation (its Mem. 3):

> To the contrary, plaintiff is arguably worse off after the expenditure of time, effort and money during the course of the [appeal, which though it resulted in affirmance did not *improve* plaintiff's recovery beyond the level obtained at the district court level]. Therefore, plaintiff was only a partially prevailing party for purposes of 42 U.S.C. § 1988 ("section 1988"). Plaintiff should be denied fees sought relating to all [appellate] work.

[9] *Farrar, id.* at 1316 n. 22 footnotes its text statement to that effect with citations from five other Courts of Appeals – but *not*

the position of this Court can responsibly accept *Farrar's* invitation.

Conclusion

City's all-out war on Willis' Petition is rejected. Its effort to carve the Petition into segments is also unpersuasive. This Court approves the Petition in its entirety, including the adjustment for delay by applying the weighted prime rate of interest to the lawyers' and paralegals' historical hourly rates (see *Fleming v. County of Kane*, 898 F.2d 553, 564-65 (7th Cir.1990) and the Appendix to this Court's opinion in *Lippo v. Mobil Oil Corp.*, 692 F.Supp. 826, 838-43 (N.D.Ill.1988)).[10] Willis' counsel are ordered to submit, by a filing in this Court's chambers (with a copy of course to City's counsel) on or before February 3, 1992, their calculation of the total amount of the award (including such interest) to be entered as of February 10, 1992. City's counsel are then ordered to apprise this Court and Willis' counsel of their agreement

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from the Seventh Circuit. That happens again in a later listing, *id.* at 1317 n. 26. It seems to appear from the next footnote (*id.* n. 27) that *Farrar* was referring, in listing our Court of Appeals as having come down on the opposite side of the issue, to the dictum in *Smith v. DeBartoli*, 769 F.2d 451 (7th Cir.1985), which had in turn been relied on by the Eighth Circuit in expressly reaching the opposite conclusion from that later arrived at in *Farrar*. But all this is of no moment – what is plain in all events is that *Farrar* is an outlier.

[10] *Fleming* was thereafter settled by the parties before this Court had the opportunity to explain on remand its reasons for applying the weighted prime rate, a concept that it had already spelled out in detail in its *Lippo* Appendix.

or disagreement with that calculation not later than the morning of February 7, to enable this Court to enter the order on the February 10 date.

Appendix

Early in the text of this opinion this Court remarked that the amount of Willis' fee Petition "would seem large if viewed in a vacuum." And it is certainly true that the operation of Section 1988 in a hotly contested lawsuit frequently produces a fee petition that is disproportionate in amount to the substantive claim. Indeed, it seems a fair guess that *Farrar,* the Fifth Circuit maverick that this Court has declined to follow, was in substantial part a reaction to the contrast between the nominal damages award of $1 and the fees and expenses of more than $300,000 that the trial court had awarded there.

But given the nature of Section 1988 and the case law applying it, the approach to litigation that this Court and its colleagues regularly encounter from state actor defendants in Section 1983 lawsuits (or from the lawyers for those defendants) is frequently itself the direct cause of such a disparity in amounts. All too often the attitude of the public officials is one of "Millions for defence, but not one cent for tribute"[1] applied with a vengeance. Any business executive who managed his or her company's litigation docket in the same manner would likely be fired, and with good reason.

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[1] Said by Charles Cotesworth Pinckney when he was our Minister to the French Republic in 1797.

Lest that seem to be an overly critical view, some further explanation is in order. Time and again this Court has seen the opportunity for nominal or modest settlements in Section 1983 cases rejected by a public law office – that of the Attorney General, Cook County State's Attorney or City of Chicago Corporation Counsel – because the client or the law office has refused to authorize them. Sometimes such a decision is based on a floodgates-type concern (that is, the belief that too much readiness to make even a small payment in settlement of a frivolous or near-frivolous claim by (say) a prison inmate may stimulate other like claims by other inmates[2]), and that is certainly a legitimate consideration.[3] But far more frequently what is at work is simple

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[2] One of the facts of life in civil rights litigation is that pro se plaintiffs usually have nothing to lose. They do not run the risk of paying any litigation expense: Their financial indigence entitles them to proceed in forma pauperis without paying a filing fee; once they pass the threshold requirement of substantial nonfrivolousness of their claims, the appointment of a lawyer to represent them on a pro bono basis (something that usually benefits the court and opposing counsel as well as the indigent plaintiff, because it produces far more manageable litigation for everyone concerned) creates no financial obligation for the plaintiff; and the potential for a Section 1988 award in favor of the defendant is not a meaningful threat if the impecunious plaintiff loses.

[3] Even that consideration tends to be given too much weight, however, Another one of the facts of life in terms of prisoners' lawsuits is that the inmate population has more than enough time to think about and work on, and then file, litigation. It seems doubtful (given the flow of such litigation into this and every other District Court) that any perceived added incentive for such filings, based on the noising about via the prison grapevine of some settlements in the most meritorious of such

intransigence (the unwillingness to adopt a realistic economic analysis), or even a total lack of understanding of what such a realistic analysis requires.

Litigation readily lends itself to a market value approach. Whether plaintiff or defendant, each litigant can and should make an effort to evaluate the potential recovery by plaintiff if wholly successful and then to discount that in terms of plaintiff's probability or improbability of success. Although the parties may differ in their respective appraisals of those factors,[4] the objectively discounted value defines the range within which (if not the precise number at which) each side is better advised

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lawsuits, would make a meaningful difference in the volume of filings.

[4] In this Court's experience, knowledgeable lawyers are seldom far apart in their estimates of what a plaintiff would recover on a best-case basis (or its equivalent, on a worst-case basis from defendant's point of view). Usually though not always the lawyers will differ primarily in how they figure the chances of ultimate success in the lawsuit – whether 50-50 or with a tilt in plaintiff's or defendant's favor. Whether that latter type of difference stems from the lack of perspective created by the advocates' combative stance or otherwise, a judge's participation in the process of settlement negotiations typically involves trying to persuade the parties that an objective evaluation calls for different numbers than those they have respectively arrived at on their own, thus narrowing or eliminating the gap between the parties. This entire process is something that our District Court's distinguished Senior Judge Hubert Will has dubbed the "Lloyds of London approach," reflecting the sensible analogy that an appropriate guide to settlement is what an objective insurer would charge as a premium for insuring a defendant against liability in the lawsuit, reflecting an evaluation of the risk but eliminating any element of profit for the insurer.

to settle than to take the all-or-nothing risk of pursuing the litigation to judgment. And where Section 1988 or other fee-shifting provisions are involved, the fees that would be payable to the successful plaintiffs' lawyers must be included as part of the potential recovery to which the appropriate probability discount should be applied by defendants in evaluating the lawsuits.

It is hard to believe that this action could not have been settled much earlier – before all the time spent by Willis' lawyers had to be piled up as it was – at a figure far, far below the amount now at risk (which is the sum of the nominal $1 in damages plus the large fee award that has been dealt with in this opinion). And whatever the outcome of the pending appeal on the merits may be, it is unquestionable that at the time that this case was potentially subject to an early settlement the then-controlling decision in *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) gave a high percentage of likelihood to Willis' chances of prevailing on his claim that his constitutional rights had been violated when he was not promptly taken before an impartial magistrate.

This Court of course has no direct knowledge of the opportunities that may or may not have existed for such settlement, or as to whether either or both sides demonstrated intransigence in that respect. But what *is* certain is that the mere disparity between the nominal damage award and the amount of the fee petition, large though it is, should not alone be the predicate for disallowance of the requested fees here.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 23, 1993.

Before

Hon. RICHARD A. POSNER, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. BARBARA B. CRABB, Chief District Judge*

MACEO G. WILLIS, JR., Plaintiff-Appellee, Nos. 91-2528 and 92-1592 v. CITY OF CHICAGO, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 86 C 9589. Milton I. Shadur, Senior Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed by plaintiff-appellee on August 13, 1993, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel** have voted to deny the petition. Accordingly,

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* The Honorable Barbara B. Crabb, of the Western District of Wisconsin is sitting by designation.

**Judge Crabb voted to grant the petition for rehearing.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby, DENIED.

RULE 3.31 Duty of Trial Bar to Accept Appointments

In testimonial proceedings (as defined in General Rule 3.00 C (1) of these Rules) arising out of matters pending before this Court, every member of the trial bar shall be available for appointment by the court to represent or assist in the representation of those who cannot afford to hire a member of the trial bar. Appointments under this Rule shall be made in a manner such that no member of the trial bar shall be required to accept more than one appointment during any twelve (12) month period.